LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 20 1974
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1732

CITY OF CHATTANOOGA, TENNESSEE,
Petitioner,

v.

RAYMOND COX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, EASTERN DIVISION

RANDALL L. NELSON
Special Counsel
400 Pioneer Building
Chattanooga, Tennessee 37402

EUGENE N. COLLINS
City Attorney
400 Pioneer Building
Chattanooga, Tennessee 37402

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
(A) Proceedings in the Chancery Court	5
(B) Proceedings in the Court of Appeals	6
REASONS FOR GRANTING THE WRIT	6
Petitioner's Action in Dismissing Respondent Did Not Violate Respondent's Fifth Amendment Rights	7
CONCLUSION	18

TABLE OF CITATIONS

Constitutional Provisions:

Fifth Amendment to the United States Constitution 2, 5, 6, 7, 8, 10, 11, 18, 19

Fourteenth Amendment to the United States Constitution 2, 8, 10

Page

Statutes:

28 U.S.C. § 1257 2

Tennessee Code Annotated §§ 27-901, et seq. 5

Private Acts of Tennessee, 1911, Chapter 10, Sections 17-8 4

Private Acts of Tennessee, 1955, Chapter 56, Section 1 4

Private Acts of Tennessee, 1957, Chapter 73, Section 2 4

Private Acts of Tennessee, 1839, Chapter 32, Section 9 4

Private Acts of Tennessee, 1901, Chapter 432, Section 5 4

Private Acts of Tennessee, 1911, Chapter 10, Sections 13, 16 4

Cases:

Beilan v. *Board of Education of Philadelphia,* 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414 (1958) 7, 8, 9

Brown v. *Walker,* 161 U.S. 591, 597, 40 L.Ed. 819, 16 S.Ct. 644 11

Broyles v. *State,* 207 Tenn. 571, 341 S.W.2d 724 (1960) 17, 18

Gardner v. *Broderick,* 393 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968) 6, 7, 11, 12, 15

Cases: **Page**

Garrity v. *New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) 7, 9, 10, 12, 13, 15, 18

Gerace v. *County of Los Angeles*, 100 Cal.Rptr. 917, cert. denied — U.S. —, 93 S.Ct. 444, 34 L.Ed. 2d 306, reh. denied, — U.S. —, 93 S.Ct. 1353, 35 L.Ed.2d 615 (Feb. 20, 1973) 15, 16

Miranda v. *Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 15

Murphy v. *Waterfront Commission of New York*, 378 U.S. 52, 100, 101, 84 S. Ct. 1594, 12 L.Ed. 2d 678 ..... 10, 15

Quinn v. *United States*, 349 U.S. 155, 161, 162, 99 L.Ed. 954, 75 S.Ct. 668, 51 A.L.R.2d 1157 11

Rogers v. *United States*, 340 U.S. 367, 371, 95 L.Ed. 344, 71 S.Ct. 438, 19 A.L.R.2d 378 11

Slochower v. *Board of Higher Education*, 350 U.S. 551, 100 L.Ed. 692, 76 S.Ct. 637 8

Ullman v. *United States*, 350 U.S. 422, 428, 100 L.Ed. 511, 76 S.Ct. 497, 53 A.L.R.2d 1008 11

Uniformed Sanitation Men's Association v. *Commissioner of Sanitation*, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968) 7, 11, 12

Uniformed Sanitation Men's Association v. *Commissioner of Sanitation*, 406 U.S. 961, 32 L.Ed.2d 349, 92 S.Ct. 2055 (1972) 14

Uniformed Sanitation Men's Association, Inc. v. *Commissioner of Sanitation*, 426 F.2d 619 (1970) .. 13

Page

Miscellaneous:

34 Minn. Law Review 1 11

8 Wigmore, Evidence (Rev. Ed.), Section 2250 11

Levy Origins of the Fifth Amendment 11

APPENDIX

Chancellor's Memorandum Opinion (Filed October 17, 1972) 21

Chancellor's Memorandum Opinion (Filed November 15, 1972) 24

Chancellor's Final Decree (Dated November 9, 1972) 26

Opinion, Court of Appeals of Tennessee, Eastern Section (Filed July 18, 1973) 28

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. ————

CITY OF CHATTANOOGA, TENNESSEE,
Petitioner,

v.

RAYMOND COX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, EASTERN DIVISION

Petitioner, the City of Chattanooga, Tennessee, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Tennessee Court of Appeals, Eastern Division, entered in this proceeding on July 18, 1973, and the judgment of the Tennessee Supreme Court denying a Petition for Certiorari entered on February 19, 1974.

OPINIONS BELOW

The opinions of the courts below in this case are not yet reported. The original Memorandum Opinion of the Chancellor of the Chancery Court of Hamilton County,

Tennessee, filed October 17, 1972, appears in the Appendix at pages 21 through 23. The Chancellor's Memorandum Opinion on Motion to Reconsider, filed November 15, 1972, appears on pages 24 through 25 of the Appendix and the Final Decree of the Chancery Court of Hamilton County is found on pages 26 and 27 of the Appendix. The Opinion of the Court of Appeals of Tennessee, Eastern Division, sitting at Knoxville, appears in the Appendix at pages 28 through 34. The Supreme Court of Tennessee denied certiorari on February 19, 1974, without opinion.

JURISDICTION

The judgment of the Court of Appeals of Tennessee was entered on July 18, 1973, and a timely Petition for Certiorari was filed with the Tennessee Supreme Court and was denied by said court on February 19, 1974. This Petition for Certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1257.

QUESTION PRESENTED

If a fire captain is required, on threat of dismissal, to answer questions pertinent to a murder investigation being conducted by his superior, and refuses to do so despite not being required to waive the "use immunity" acquired by the threat, is the privilege against self-incrimination under the Fifth Amendment to the United States Constitution a bar to his dismissal?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States as it is applied to the states through the Fourteenth Amendment is involved in this matter.

STATEMENT OF THE CASE

The relevant facts of this case are substantially without dispute and are summarized as follows:

On March 11, 1972, one Leon Hicks was murdered in the City of Chattanooga and the ensuing investigation eventually focused upon one Harry Brooks Daniels, an ex-convict with a long record, as the prime suspect.

The suspect, Daniels, was arrested in Atlanta on another charge and among his possessions at the time of his arrest was an address book containing the name and telephone number of Raymond Cox, a Captain in the Chattanooga Fire Department. Also, both the listed and unlisted numbers of the Fire Hall at which Mr. Cox worked were enumerated in the address book. In an effort to place the suspect in the City on the murder date, and to determine the relationship between the City employee and the suspect, particularly in view of the fact that the address book contained the number of the Fire Hall where Mr. Cox spent his on-duty hours, Mr. Cox was picked up on April 4, 1972, and taken to City Hall for questioning.

Upon arrival, he was informed of the nature of the investigation, advised of his Miranda rights, as are all Police and Fire Department employees whenever questioned, and asked to sign a waiver of rights form. He refused to sign the form and then looking up at the ceiling refused to even glance at the pictures of the suspect presented to him in the hope that he could identify Daniels and place him in Chattanooga on the murder date. Further he refused to answer any questions about whether he knew the suspect or if the suspect had been in town on the date in question or to answer any questions at all.

Mr. Cox was given the opportunity to make not just one, but seven or eight phone calls. Faced with his absolute failure to cooperate, his superior, the Commissioner

of Fire and Police of the City of Chattanooga, was called in and ordered him to cooperate, and told him that if he did not he would be dismissed if legally permissible.[1] Mr. Cox's attorney thereupon called and Mr. Cox was not asked anything further relative to the matter, in conformity with his rights, until after his attorney arrived. Shortly thereafter his attorney arrived and was fully informed of the matter of the investigation and the reasons for the questioning and of what had transpired. He was then given full opportunity to confer and consult with his client, Mr. Cox. Thereafter, Mr. Cox was again given opportunity to look at the pictures and answer the questions, but he again refused. He was then permitted to leave. It was testified that if he had answered the questions after his attorney arrived, he would not have been dismissed.

At no time was it ever demanded that Mr. Cox sign any waivers of immunity from prosecution. Further, after Commissioner Roberts' threatened him with loss of his job, he was not again asked to sign the Miranda form, nor was the failure to sign the form originally a consideration in the discharge, nor did Commissioner Roberts ever bring up the subject of Mr. Cox waiving his rights.

Mr. Cox's attorney requested that no action be taken on petitioner's job status until he had opportunity to consult with the Commissioner, which request was honored and it wasn't until the next day, after a telephone conversation

---

[1] City government in the City of Chattanooga is divided into five (5) departments, one of which is the Department of Fire and Police, which department embraces all matters pertaining to fire and police and which department is headed by one man, the Commissioner of Fire and Police. Private Acts of Tennessee, 1911, Chapter 10, Sections 17-8; Private Acts of Tennessee, 1955, Chapter 56, Section 1; Private Acts of Tennessee, 1957, Chapter 73, Section 2. Said commissioner must take an oath to faithfully discharge the duties of his office. Private Acts of Tennessee, 1839, Chapter 32, Section 9; Private Acts of Tennessee, 1901, Chapter 432, Section 5; Private Acts of Tennessee, 1911, Chapter 10, Sections 13, 16.

between the Commissioner and the attorney that Mr. Cox was dismissed by letter for insubordination, conduct unbecoming a member of the Fire Department, and refusal to cooperate in an official investigation of the department.

Mr. Cox then appealed his discharge to the Board of Commissioners, the governing body of the City of Chattanooga, and the discharge was upheld by a 4 to 0 vote, Commissioner Roberts recusing himself.

(A) Proceedings in the Chancery Court.

Thereafter Mr. Cox brought a Petition for Certiorari pursuant to Tennessee Code Annotated §§ 27-901, et seq., in the Chancery Court of Hamilton County alleging his rights under the Fifth Amendment to the United States Constitution had been violated and was awarded summary judgment by said court which held that his discharge for the reasons stated violated his Fifth Amendment rights. (Page 3, Memorandum Opinion of October 17, 1972, of Chancellor, Appendix p. 23)

That Court, while stating its interpretation of the rule to be that "if a public employee is asked pointed questions which might incriminate him without at the same time being required to waive his immunity from self-incrimination he may, if he refused to give requested information, be discharged from his public employment", held that the Miranda warning presented to him at the commencement of interrogation, before he was threatened with loss of his job, constituted a demand for waiver of immunity from self-incrimination so that the rule did not apply. Petitioners herein contend this is error because it ignores the "use immunity" conferred on Mr. Cox by the Commissioner's threat.

(B) Proceedings in the Court of Appeals.

The case was then appealed by the City of Chattanooga to the Court of Appeals of Tennessee, Eastern Division, assigning as error that Mr. Cox's Fifth Amendment rights had not been violated but that Court affirmed the decision below, quoting extensively therefrom. In addition, said Court held that Mr. Cox was under no duty to cooperate with his superior in this matter, apparently relying upon the quote from *Gardner* v. *Broderick* that officers of municipalities need only answer "questions specifically, directly, and narrowly relating to the performance of their official duties", and that therefore Mr. Cox's Fifth Amendment rights were violated. (Appendix pp. 33-34, Page 5 of Opinion of Court of Appeals) Petitioners aver that this, too, was in error, it being the duty of all officers of the Fire and Police Department, which is a single department within the governmental structure of the City of Chattanooga under the supervision of Commissioner Roberts, to protect the public safety and to assist its commissioner, their superior officer, in the performance of his duties. Further the Court of Appeals overlooked the fact that not only was the murder being investigated, but that the Commissioner and those within his department had the right to know if and why the captain was using on-duty time at the fire hall to discuss or further his relationship with the murder suspect.

REASONS FOR GRANTING THE WRIT

This Court has, on several occasions, addressed itself to the issue of governmental employees' rights, under the Fifth Amendment, to remain silent and also to keep their jobs, when their public duty would impel them to answer. It is respectfully submitted that the state courts below have herein decided the federal question under the Fifth Amend-

ment to the United States Constitution in a way which is not in accord with the applicable decisions of this Court including *Gardner* v. *Broderick*, 393 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); *Uniformed Sanitation Men's Association* v. *Commissioner of Sanitation*, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1082 (1968); and *Beilan* v. *Board of Education of Philadelphia*, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414 (1958).

The whole history of the cases in this Court on governmental employees' Fifth Amendment rights to remain silent make it plain that it is not improper to dismiss such employees where they have a duty to speak and fail to do so despite the fact that they are not required to waive immunity from prosecution.

PETITIONER'S ACTION IN DISMISSING RESPONDENT DID NOT VIOLATE RESPONDENT'S FIFTH AMENDMENT RIGHTS.

Briefly and most succinctly put, it is the petitioner's position that Mr. Cox's Fifth Amendment rights were in no way prejudiced because, before he was questioned, he was advised of his rights and then asked to give a voluntary statement. This was altogether proper and in no way violated his rights. At least to these petitioners' knowledge, it has never been held to be a violation of anyone's rights to be asked to give a voluntary statement after being given the Miranda rights. Then, when Commissioner Roberts ordered Mr. Cox to cooperate on pain of dismissal, said warning, as a matter of law, constituted coercion and, as a matter of law, nothing he said thereafter nor the fruits thereof could be used against him in a criminal proceeding. *Garrity* v. *New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed. 2d 562 (1967). Coupled with the fact that Mr. Cox was

informed of his right to counsel and actually had counsel present with him, his rights were at all times fully protected.

Mr. Cox's primary reliance has been on the assertion that a municipality cannot dismiss an employee for failing to answer questions when he relies on his Fifth Amendment rights, and that such violates the due process clause of the Fourteenth Amendment to the United States Constitution. It is respectfully submitted that this assertion is unsound in law, and contrary to the decisions of this Court.

This Court dealt with this subject in *Beilan* v. *Board of Education of Philadelphia,* 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414 (1958). Therein, the petitioner, a public school teacher, was discharged by the local school board because of his refusal, continued after a warning that failure to answer might lead to his dismissal, to answer a question of his superintendent as to his membership in a Communist political association. This Court said therein:

> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher."

This Court further said:

> "The board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities — not upon those activities themselves. . . . It found him insubordinate and lacking in frankness and candor."

This Court then went on to distinguish *Slochower* v. *Board of Higher Education,* 350 U.S. 551, 100 L.Ed. 692, 76 S.Ct. 637, cited by Mr. Cox, on the basis that that case

did not involve an inquiry by city authorities themselves as to a matter directed at " 'the property, affairs, or government of the city, or . . . official conduct of city employees.' " Here, as in *Beilan,* the inquiry was by city authorities as to a matter concerning the "affairs" and "government of the city". Certainly, it is a proper function of city government to investigate murders and apprehend the perpetrators thereof. Similarly, it is proper for city authorities to investigate the conduct of its employees while on duty and to find out if and why communications between them and known felons is necessary in the course of city business and on city time. Thus, this case clearly falls within the doctrine first enunciated in *Beilan* and is distinguishable from the *Slochower* case.

Very important to the decision in the case at bar is the decision of this Court in *Garrity* v. *New Jersey, supra,* which dealt with the other side of the coin (i.e., whether statements obtained from city employees under threat of job loss could be used against them in a criminal proceeding). In that case, as in the case at bar, during the course of an official investigation, certain officers were called in and, as a prelude to questioning, were advised that anything they might say could be used against them in a criminal proceeding; that they had the privilege to refuse to answer if their answer would tend to incriminate them; and that if they refused to answer, they would be subject to removal from office. As a result of the latter, they answered the questions. Thereafter, some of their answers were used against them, over their objections, in a criminal proceeding and they were convicted. On appeal to this Court, it was held that having the choice of self-incrimination or job forfeiture imposed upon them was tantamount to coercion, thereby rendering their statement involuntary and their convictions were reversed. This Court said:

> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all whether they are policemen or other members of the body politic."

The immunity thus conferred by threat of removal from office, and as conferred by *Garrity*, has been termed "use immunity".

Applying *Garrity* to the case at bar, it is plain that petitioner was not deprived of his Fifth Amendment rights.

In both cases the officers were advised that anything they said could be used against them in a criminal proceeding; in both cases they were advised that they had the privilege to remain silent if their answers might tend to incriminate them; and in both cases they were advised that if they refused to answer they would be subject to removal from office.

If Mr. Cox had chosen to speak, it is clear under *Garrity*, that his answers could not have been used against him. He, therefore, had no Fifth Amendment right to remain silent because where the government is precluded from using testimony or its fruits against a witness in a criminal proceeding, he may be compelled to answer (*Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 100, 101, 84 S.Ct. 1594, 12 L.Ed.2d 678). Since there was, then, no Fifth Amendment right to remain silent, Mr. Cox's dismissal for remaining silent could not violate his rights.

This case is directly analogous to a situation, such as *Murphy*, where a witness chooses to remain silent after being given immunity by a court. Therein, it was held that he may be cited for contempt of court without violating his Fifth Amendment rights. Here, instead of being

cited for contempt, he was discharged and his discharge no more violates his rights than did the contempt citation in *Murphy*.

The privilege against self-incrimination was designed to prohibit the government from using a man's compelled testimony against him and was not designed to allow a witness to use the privilege to shield others or to relieve himself from the central duty to give evidence. *Ullman* v. *United States*, 350 U.S. 422, 428, 100 L.Ed. 511, 76 S.Ct. 497, 53 A.L.R.2d 1008; *Brown* v. *Walker*, 161 U.S. 591, 597, 40 L.Ed. 819, 16 S.Ct. 644; *Quinn* v. *United States*, 349 U.S. 155, 161, 162, 99 L.Ed. 954, 75 S.Ct. 668, 51 A.L.R.2d 1157; 34 Minn. Law Review 1; Levy Origins of the Fifth Amendment; 8 Wigmore, Evidence (Rev. Ed.) Section 2250; *Rogers* v. *United States*, 340 U.S. 367, 371, 95 L.Ed. 344, 71 S.Ct. 438, 19 A.L.R.2d 378.

Several other recent decisions of this Court are also important in consideration of this case. In *Gardner* v. *Broderick*, 393 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968), and *Uniformed Sanitation Men's Association* v. *Commissioner of Sanitation*, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968), a new element was injected. There the public authorities attempted both to coerce testimony by threatening removal and to require a waiver of immunity from prosecution, an element not found in the case at bar. The net effect of this was to compel to relinquishment of Fifth Amendment rights because the waiver of immunity from prosecution would operate to destroy the "use immunity" and permit coerced testimony to be used in a criminal proceeding. This was obviously unconstitutional and this Court so held.

In *Gardner*, the police officer was dismissed pursuant to a provision of the New York City Charter which provided that the employment of a city employee would terminate

if he should refuse, before an appropriate tribunal, to answer questions in relation to his duties on the ground that his answers might tend to incriminate him, *or if he should refuse to waive immunity from prosecution* on account of any such matter in relation to which might be properly called upon to testify. The officer was dismissed because as a witness before the Grand Jury *he refused to waive immunity from prosecution.* This occurred prior to the *Garrity* decision. In holding that *the requirements of a waiver of immunity voided the dismissal,* this Court, nevertheless, with approval announced the following principals, 392 U.S. 273, 277, 88 S.Ct. 1913, 20 L.Ed.2d 1086:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity* v. *New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal."

This is precisely what happened in the case at bar. Mr. Cox was never asked nor required to waive immunity from prosecution nor to waive the "use immunity" conferred upon him by *Garrity.* Thus, the privilege against self-incrimination is not a bar to his dismissal.

These same principals were applied in the *Uniformed Sanitation Men's Association* case. There, as in *Gardner,* the employees had been discharged because of their refusal to sign waivers of immunity from prosecution in the course of investigatory proceedings. The Court said in *Gardner*:

> "Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. At

> the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

Thus, if Mr. Cox here was not required to waive immunity from prosecution as guaranteed by *Garrity*, his constitutional rights were not infringed.

Adding further credence to this is, that upon reversal of the dismissal of the employee by this Court in the *Uniformed Sanitation Men's Assocation* case, the New York Sanitation Department again called the men in, advised them of their constitutional rights, including the right to counsel and to remain silent, but warned them that failure to answer the questions would subject them to disciplinary actions. They were further advised that answers they gave could not be used against them in a criminal prosecution. The men again refused to answer on the ground of privilege against self-incrimination. They were thereupon suspended and later were dismissed and again sought relief in the federal courts. They were, as in the case at bar, granted summary judgment and their reinstatement was directed by the District Court, but the Court of Appeals reversed with instructions to grant summary judgment for the defendants. *Uniformed Sanitation Men's Association, Inc.* v. *Commissioner of Sanitation*, 426 F.2d 619 (1970).

Judge Friendly quoted from the above cases of this Court and then held *inter alia*:

> "These extracts make as clear as anything can be that 'use immunity' suffices for the discharge of public employees who 'refuse to account for their performance of their public trust.' . . . To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning

his official conduct, although assured of protection against use of his answers or their fruits in any criminal prosecution, would push the constitutional protection beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights."

"If 'use immunity' thus suffices to permit the discharge of a public employee who refuses to answer questions about his conduct on the ground of self-incrimination, we see no reason why there must be a statute conferring it."

Finally, the Court observed:

"Justice Fortas stated in so many words that if a public officer is asked about performance of his official duties and is not required to waive immunity, the privilege is not a bar to his dismissal for his refusal to answer."

The Court then held that public employees do not have an absolute right to keep silent and keep their jobs, but just the right to have neither what they say under compulsion, nor its fruits, be held against them in a criminal proceeding.

This Court thereafter denied review of the second *Uniformed Sanitation Men's Association* case, 406 U.S. 961, 32 L.Ed.2d 349, 92 S.Ct. 2055 (1972).

The only material difference between that case and the one at bar is that Mr. Cox here was not advised by the police of the *Garrity* decision and "use immunity". However, this was not necessary because he was given full opportunity to confer with counsel of his own choosing and this was adequate provision for protection of his rights. Further, counsel was permitted to go back to his law office to consult the law if he chose, and it was not until the next day, after a subsequent conversation between counsel and the Commissioner, that Mr. Cox was dismissed.

As this Court held in the landmark decision of *Miranda* v. *Arizona,* 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602:

> 'The denial of the defendant's request for his attorney does undermine his ability to exercise the privilege — to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege."

In the most recent case decided on the issue, *Gerace* v. *County of Los Angeles,* 100 Cal.Rptr. 917, cert. denied — U.S. —, 93 S.Ct. 444, 34 L.Ed.2d 306, reh. denied, — U.S. —, 93 S.Ct. 1353, 35 L.Ed.2d 615 (Feb. 20, 1973), the Court there held exactly in accord with the petitioner's position herein. After discussing *Garrity, Gardner,* and *Murphy,* it held:

> "In brief, neither one of the appellants were required to give up immunity. In fact, they were specifically granted one by the form of the investigation and indirectly but nonetheless effectively by the compulsion of testimony. Such immunity removed any constitutional objection to compelling their answers.
>
> When the department chose to invoke administrative procedures to inquire into their fitness as police officers and most particularly when they chose to compel answers by invoking the Manual of Policy and Ethics, the appellants became secure from prosecution as surely as if a grant of immunity had been given to them."

Thus, it cannot be doubted that the rule that where an employee is not required to waive immunity from prosecution, he may be dismissed for failure to answer

questions after being advised that the refusal to do so will lead to disciplinary action.

Further, the Court in *Gerace* took up the issue of whether an employee may be dismissed for conduct not related to assigned duties although related to official duties. In that case, two sheriff's deputies, who were husband and wife, were discharged after being granted use immunity in an administrative investigation, for securing an unlawful abortion for the wife and failing to arrest the abortionist. Against their contention that the investigation in questioning was not specifically, directly and narrowly related to the performance of their official duties, inasmuch as they were not assigned to the vice squad and the matters inquired about were of a private and personal nature and not related to official duties, the Court said:

> "Nor is it of any aid to the Geraces that their assigned duties did not involve them in the active investigation of the crime of abortion, nor that the questioned activity occurred during off-duty hours."

The Court then went on to hold that their duties were not limited to a certain specialty which might happen to be a major focus of their current departmental assignment and that good administration demanded that "personnel adhere strictly to policies designed to prevent the erosion of the competency and integrity of the law enforcement service." The thrust of Mrs. Gerace's duties had been toward transporting female prisoners and working with juries. Mr. Gerace's duties had been in doing background investigations on those in the reserve force.

Perhaps most directly here in point is the concurring opinion in *Gerace,* wherein it was provided:

> "The authority of the sheriff to command truth from his peace officers during an official investigation should

be unquestioned; otherwise the age-old question who watches the watchman will receive an unsatisfactory answer.

. . .

The sheriff is entitled to require his deputies to reveal the identities of felons he is charged with apprehending . . . since the sheriff is charged with the apprehension of such persons he may require his deputies to assist him in the performance of that duty to the fullest extent possible.

Thus, viewed in true prospective, the cause arose from a complaint of extortion by deputy sheriffs, in the investigation of which the sheriff became entitled to demand truthful answers from his deputies, and the deputies became obliged to give truthful answers to the sheriff. When appellants failed to do this, their discharge as peace officers became warranted. Indeed, it is difficult to see how the sheriff could have acted otherwise and still preserve the integrity of his office."

Similarly, under the situation in the case at bar, the authority of the Commissioner of Fire and Police during an official investigation over those under his command should be unquestioned. Since the Commissioner is charged with the apprehension of felons, he should be able to require all of his employees to assist him in the performance of that duty to the fullest extent possible.

Indeed, in a recent Tennessee case, *Broyles* v. *State*, 207 Tenn. 571, 341 S.W.2d 724 (1960), a police chief was removed from office for failure to report a subordinate's illegal conduct to the chief's superior. The Tennessee Supreme Court said therein:

"One whose duty it is to enforce the law should be much more conscientious in seeing that he and those under him comply with the law in its every detail so

> that in trying to bring to bear the statutes as written that he should have respect in administering the law."

Thus, it is clear, that the Commissioner of Fire and Police having the duty to enforce the law, he must see to it that all of his subordinates are conscientious in order that he might have respect in administering the law. Mr. Cox having failed to cooperate, he is subject to dismissal. It is further clear, from the *Broyles* case, that the misconduct necessary for removal need not imply corruption or criminal intention and may fall short of the commission of a crime itself.

It is therefore respectfully submitted that the Commissioner of Fire and Police's order to Mr. Cox was perfectly in order and necessary to faithfully comply with the duties of his office, and it was the duty of Mr. Cox to candidly and frankly answer the questions put to him. Failing that, he was properly discharged for insubordination and conduct unbecoming a member of the department.

CONCLUSION

It is respectfully submitted that Mr. Cox's Fifth Amendment rights were at no time infringed. When he was first questioned, it was with the idea of his making a voluntary statement after being informed of his rights. This was certainly no infringement of the Fifth Amendment. Then, when it became obvious that he would not answer, and the Commissioner of Fire and Police ordered him to do so on pain of dismissal, his Fifth Amendment rights were protected by the use immunity made applicable by *Garrity* v. *New Jersey*. There was no time when his rights were in any way violated, and, if anything, they were more than abundantly protected by letting him make so many

phone calls, having the presence of counsel and waiting until the next day to dismiss him, giving counsel and himself time to fully consider the matter.

As to the matter of the order Mr. Cox refused to obey being related to his duties, if his superior, whose duty it is to apprehend criminals and to administer the single department of Fire and Police, cannot call upon members of the department, his subordinates, to help him fulfill the duties of his office, then certainly the efficiency of the department and the public's respect for and trust in the department are seriously jeopardized. Further, his superior should have the unquestioned right to determine if and why Mr. Cox apparently found it necessary to speak with a known and convicted felon during his on-duty hours, using the unlisted phone number of the fire hall at which he worked. It is therefore submitted that the order of Commissioner Roberts to cooperate on pain of dismissal was perfectly in order and that the authority hereinabove cited amply demonstrates that it was Mr. Cox's duty to cooperate or be subject to valid dismissal.

It is therefore respectfully submitted that this Court should review the action of the courts below in holding that Mr. Cox's Fifth Amendment rights were violated.

Respectfully submitted,

EUGENE N. COLLINS
City Attorney

RANDALL L. NELSON
Special Counsel for the
City of Chattanooga, Tenessee
400 Pioneer Building
Chattanooga, Tennessee 37402

APPENDIX

IN THE CHANCERY COURT, PART 1,
OF HAMILTON COUNTY, TENNESSEE

No. 45510

RAYMOND COX,

Plaintiff,

v.

CITY OF CHATTANOOGA, et al.,

Defendants.

CHANCELLOR'S MEMORANDUM OPINION

(Filed October 17, 1972)

This is a certiorari proceeding to review the action of the City Commission of Chattanooga, after hearing, discharging the petitioner, Raymond Cox, from his position in the City Fire Department. The Cause has been submitted to the Court upon motions for summary judgment filed both by the plaintiff and defendants and upon briefs and argument. The City Police Department was investigating a murder case when a suspect was arrested in Atlanta, Georgia and was found in possession of an address book which contained the name of the petitioner, Raymond Cox, and beside it a telephone number which was the number for the fire hall where petitioner was employed. Another number for the same fire hall was also found in said address book. Following up this lead, detectives of the City of Chattanooga

went to the residence of the petitioner and asked him to accompany them to police headquarters, which he did. Upon arriving at police headquarters and before questioning the petitioner he was submitted a "Your Constitutional Rights" form stating, among other things, "You have the right to remain silent. Anything you say can be used against you in court. . . ." and the pertinent part of said form, which was as follows:

"WAIVER OF RIGHTS

> I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure, force or coercion of any kind has been used against me.
>
> Signed .....
> 'Refused' "

The petitioner refused to sign said waiver and refused to answer any questions asked him by the investigating officers, who thereupon called in the Commissioner of Fire and Police who advised the petitioner that unless he "cooperated" with the police in this investigation as requested that he would discharge the petitioner if the city attorney advised it was possible to do so. Nevertheless, the petitioner, having consulted counsel, continued to remain silent.

The next day, the petitioner was discharged from his position as a city fireman for "insubordination, for conduct unbecoming a member of the firefighting service and for refusing to cooperate to any extent in an official investigation of the Chattanooga Police Department."

The parties have filed excellent briefs detailing several recent opinions of the Supreme Court of the United States

dealing with the question here presented. Without discussing each case separately, suffice it to say the Court is of the opinion that the decision in *Uniformed Sanitation Men's Ass'n.* v. *Commissioner of Sanitation of the City of New York,* 88 S.Ct. 1917, is controlling and requires that the action of the City Commission in discharging the petitioner be reversed. See also: *Gardner* v. *Broderick,* 88 S.Ct. 1913.

As the Court understands the cases, the long and short of it is that if a public employee is asked pointed questions which might incriminate him *without at the same time being required to waive his immunity from self-incrimination* he may, if he refuses to give the requested information, be discharged from his public employment, but, on the other hand, he cannot be discharged from his public employment for failure to waive his constitutional rights against self-incrimination. See also: *Garrity* v. *State of New Jersey,* 87 S.Ct. 616. The Court is satisfied that in this case the petitioner was in fact discharged for his refusal to waive his right against self-incrimination by signing the waiver of rights form presented to him at the beginning of his interrogation and, therefore, that his discharge for such a reason violates his rights under the Fifth Amendment of the United States Constitution. Accordingly, the motion for summary judgment filed by the petitioner will be sustained.

October 17, 1972.

/s/ RAY L. BROCK, JR.
CHANCELLOR – Part 1

IN THE CHANCERY COURT, PART 1,
OF HAMILTON COUNTY, TENNESSEE

No. 45510

RAYMOND COX,

Plaintiff,

v.

CITY OF CHATTANOOGA, et al.,

Defendants.

CHANCELLOR'S MEMORANDUM OPINION

(Filed November 15, 1972)

In this case the Court filed a memorandum opinion dated October 17, 1972, but since then the defendant has filed a motion to reconsider which has been argued and considered by the Court. The Court adheres to its previous opinion and is satisfied that under the peculiar facts of this case the petitioner was discharged for refusal to waive his right of immunity from self-incrimination. At no time was he told that any evidence which he might give would not be used against him in a criminal prosecution; but, instead, the Commissioner of Fire and Police merely insisted that the petitioner "cooperate" with the police in their investigation of the crime in question. In view of the fact that we are considering the valued constitutional right against self-incrimination, the demand for "cooperation" with the police investigation in the circumstances of this case must be held to be a demand that the petitioner waive his rights against self-incrimination under penalty of losing his job if he refused. It must be remembered that

in this instance the petitioner was not acting in his capacity as a fireman, but was being dealt with as any other citizen or potential witness would be dealt with by the police. Accordingly, the petition to reconsider is overruled.

November 15, 1972.

/s/ RAY L. BROCK, JR.
CHANCELLOR – Part 1

IN THE CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE

PART ONE

No. 45510

RAYMOND COX,

Plaintiff,

vs.

CITY OF CHATTANOOGA, et al.,

Defendants.

FINAL DECREE

This cause came on to be heard on the 15th day of September, 1972 on Motions for Summary Judgment filed by both the plaintiff and defendants, the transcript of the City Commission hearing held on June 25, 1972, before the Chattanooga City Commission of the City of Chattanooga, Tennessee, briefs of both the complainant and defendant and oral argument by counsel, and for the reasons set forth in its Memorandum Opinion, filed October 17, 1972, which is hereby incorporated by reference in this Decree, and made a part hereof as fully as though copied herein in order to be made a part of the record in this cause the Court is of the opinion that the complainant's Motion for Summary Judgment is well taken and should be sustained.

It is therefore, ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by

the complainant in this regard be, and hereby is, sustained. It is further

ORDERED, ADJUDGED AND DECREED that the decision of the Board of Commissioners, City of Chattanooga, Tennessee, in firing the complainant be set aside and that the complainant be reinstated to the Fire Department, City of Chattanooga, Tennessee and that he be paid all wages denied him during his period of termination less any outside earnings or other sums he may have received as compensation during the time he was excluded from his position. It is further

ORDERED, ADJUDGED AND DECREED that the defendants bear the costs of this cause for which execution may issue.

To all of the above the defendants excepted and now except and prayed an appeal to the next term of the Court of Appeals sitting at Knoxville, which appeal is granted upon executing an Appeal Bond conditioned as required by law and ninety (90) days are allowed from the date of this Order in which to file their Bill of Exceptions and otherwise perfect said Appeal.

This the 9 day of November, 1972.

/s/ KAY L. BROCK, J.
Chancellor, Part I

APPROVED FOR ENTRY:

.....
Counsel for Petitioner

/s/ RANDALL L. NELSON
Counsel for Defendants

[CERTIFICATE OF SERVICE OMITTED]

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FROM THE CHANCERY COURT FOR
HAMILTON COUNTY

HON. RAY L. BROCK, JR., CHANCELLOR

AFFIRMED

(Filed July 18, 1973)

RAYMOND COX,

Appellee,

vs.

CITY OF CHATTANOOGA, ET AL,

Appellants.

EUGENE N. COLLINS, City Attorney, and RANDALL L. NELSON, Special Counsel, FOR APPELLANTS

JERRY H. SUMMERS OF CHATTANOOGA FOR APPELLEE

OPINION

(Filed July 18, 1973)

Parrott, J.

The Board of Commissioners of the City of Chattanooga has appealed from the chancellor's order reinstating fire captain Raymond Cox whose dismissal for insubordination and conduct unbecoming the fire-fighting service was unanimously affirmed by the Board.

The Chattanooga Police Department was conducting an investigation of a murder which occurred in that city on

March 11, 1972. Harry Brooks Daniels, a suspect of the murder, was arrested in Atlanta, Georgia. On his person was found an address book which contained the name of Raymond Cox, his home telephone number and the two telephone numbers of the precinct station where Captain Cox worked. Two city detectives went to the Cox home and requested he accompany them to the Chattanooga Police Department for questioning. Captain Cox voluntarily rode to the headquarters where the police presented the following form which Captain Cox refused to sign:

YOUR CONSTITUTIONAL RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering questions at any time. You also have the right to stop answering questions at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure, force or coercion of any kind has been used against me.

Signed .....

(refused)

Commissioner of the Fire and Police Departments of the City of Chattanooga, Gene Roberts, came into the headquarters and informed Captain Cox that if he did not cooperate with the officers in this investigation, that if the city attorney approved, he [Commissioner Roberts] would fire him.

Captain Cox requested to see an attorney. Upon his attorney's arrival at the headquarters and after a private discussion between Cox and his attorney, Cox again refused to answer any questions or look at any of the pictures offered by the investigating officers.

On the next day Commissioner Roberts sent a letter to Captain Cox which stated the following:

> "This is to advise you that effective at the end of your working day this date your employment with the Chattanooga Fire Department is terminated.
>
> "You are being dismissed for insubordination, for conduct unbecoming a member of the fire-fighting service and for refusing to cooperate to any extent in an official investigation of the Chattanooga Police Department."

Captain Cox asked for and was granted a hearing before the full Board of Commissioners of the City of Chattanooga. This hearing was held on June 25, 1972, and by unanimous vote the Board affirmed the dismissal of Captain Cox.

Thereafter Captain Cox, by petition for certiorari, asked for a review of the Board's action by the chancery court. In the chancery hearing, after hearing proof on a motion for summary judgment, the chancellor entered a decree holding Captain Cox had a right to remain silent under the Fifth Amendment and his discharge was a violation of his constitutional rights. The chancellor's decree ordered Captain Cox reinstated with full pay.

From this decree the City has appealed asking for a reversal of the chancellor's order.

There are numerous cases involving municipal and public employees' dismissals under the threat of loss of employment. *Slochower* v. *Board of Higher Education of the City of New York,* 76 S.Ct. 637, 350 U.S. 551; *Garrity* v. *State of New Jersey,* 87 S.Ct. 616, 385 U.S. 493; *Gardner* v. *Broderick,* 88 S.Ct. 1913, 392 U.S. 273; *Uniformed Sanitation Men Assn.* v. *Commissioner of Sanitation of the City of New York,* 88 S.Ct. 1917; *Kastigar* v. *United States,* 92 S.Ct. 1653; *Zicarelli* v. *New Jersey State Commission of Investigation,* 92 S.Ct. 1670.

As we all know, the Fifth Amendment to the United States Constitution provides that no one shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without the due process of law.

Our United States Supreme Court has held this constitutional right to be one of the most valuable prerogatives of a citizen and there shall not be imputed any sinister meaning by one's exercise of the right. *Brown* v. *Walker,* 161 U.S. 591, 610 S.Ct. 644; 40 L.Ed. 819.

Also our Supreme Court has held that the free choice to speak out or remain silent is extended to all. In *Garrity* v. *State of New Jersey, supra,* the Court said:

> ". . . we conclude that policemen, like teachers and lawyers, are not relegated to watered-down version of constitutional rights . . . there are rights of constitutional stature whose exercise a State may not condition by the exaction of a price . . . we now hold the protection of an individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, that it

extends to all, whether they are policemen or other members of our body politic."

The chancellor in his order of reinstatement of Captain Cox cited and heavily relied upon the decision by the United States Supreme Court in *Uniformed Sanitation Men Assn.* v. *Commissioner of Sanitation of the City of New York* (1968), 88 S.Ct. 1917, where it was said:

"Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege. Three were asked to sign waivers of immunity before the grand jury. Twelve were told that their answers to questions put to them by the Commissioner of Investigation could be used against them in subsequent proceedings, and were discharged for refusal to answer the questions on this basis. *Garrity* v. *State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed. 2d 562 (1967), in which we held that testimony compelled by threat of dismissal from employment could not be used in a criminal prosecution of the witness, had not been decided when these 12 petitioners were put to their hazardous choice. In any event, we need not decide whether these petitioners would have effectively waived this constitutional protection if they had testified following the warning that their testimony could be used against them. They were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally.

"As we stated in Gardner v. Broderick, supra, if New

> York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. Gardner v. Broderick, supra; Garrity v. State of New Jersey, supra. Cf. Murphy v. Waterfront Commission, 378 U.S. 52, at 79, 84 S.Ct. 1594, 1607, at 1609, 12 L.Ed.2d 678 (1964). At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

It is apparent from the above, a public employee may be discharged for failing to give an account to his superiors for matters directly relating to the performance of his official duties but not to matters outside the scope of his duties. See *Slochower* v. *Board of Higher Education of the City of New York, supra; Gardner* v. *Broderick, supra.*

In this case there is no claim or contention the investigation of the murder was in any way related to or within the scope of duties of Captain Cox. Thus, as distasteful as it may be to some, Captain Cox had the constitutional right under the Fifth Amendment to remain silent. His discharge from his employment, as found by the chancellor, is illegal and in violation of his rights under the Consti-

tution. Accordingly, the decree is affirmed with costs taxed to the appellant.

.....

JAMES W. PARROTT, J.

CONCUR:

.....

ROBERT E. COOPER, P.J. (E.S.)

.....

CLIFFORD E. SANDERS, J.

LIBRARY
SUPREME COURT, U. S.

FIL
AUG 30

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1732

CITY OF CHATTANOOGA, TENNESSEE,
Petitioner,

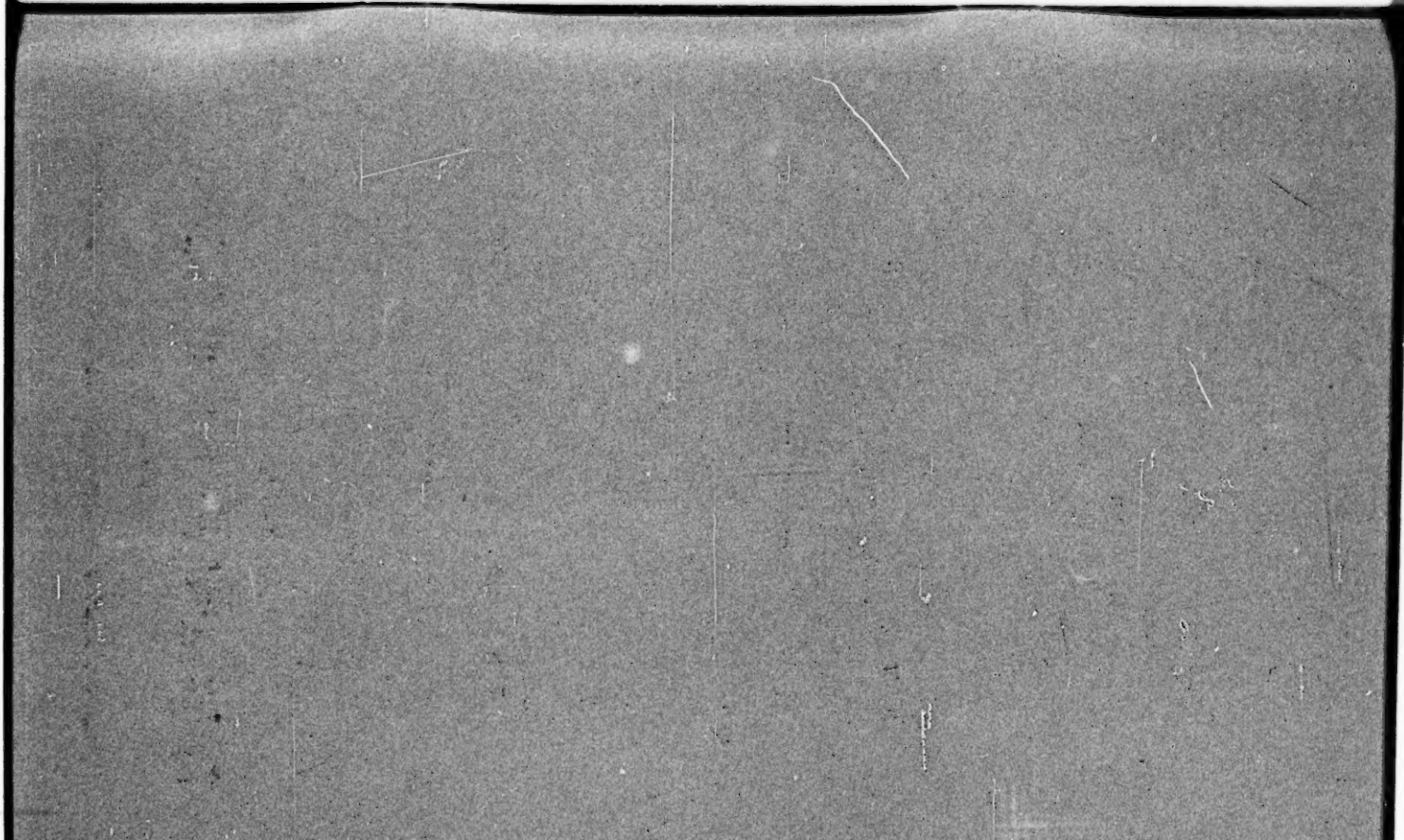
v.

RAYMOND COX,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE EASTERN DIVISION

JERRY H. SUMMERS,
Attorney at Law,
Fifth and Lindsey Streets,
Chattanooga, Tennessee 37403,
Attorney for Respondent.

TENNESSEE LAW PRINTERS, P. O. Box 327, Knoxville, Tennessee, Phone 525-5555
8-27-74-48



INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	16
APPENDIX	17

CITATIONS

Cases:

Gardner vs. Broderick,
88 S.Ct. 1913, 392 U.S. 273 9

Garrity vs. State of New Jersey,
87 S.Ct. 616, 385 U.S. 493 7

Kastigar vs. United States,
92 S.Ct. 1653 12

Slochower vs. Board of Higher Education of the City of New York,
76 S.Ct. 637, 350 U.S. 551 6

Uniformed Sanitation Men Association vs. Commissioner of Sanitation of the City of New York,
88 S.Ct. 1917 10

Zicarelli vs. New Jersey State Commission of Investigation,
92 S.Ct. 1670 13

Constitution of the United States:

Fifth Amendment 4
14th Amendment 5

Miscellaneous:

Tennessee Law Review, Vol. 39, No. 2 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1732

CITY OF CHATTANOOGA, TENNESSEE,
Petitioner,

vs.

RAYMOND COX,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE EASTERN DIVISION

OPINION BELOW

The unreported opinion of the Court of Appeals of Tennessee, Eastern Division, was entered and filed on July 18, 1973. The Supreme Court of Tennessee denied a petition for certiorari in this case in an order filed February 19, 1974. A copy of the opinion of the Court of Appeals is appended to this Brief. The Chancellor's Memorandum Opinion in the trial court is appended to the petition for certiorari filed on behalf of City of Chattanooga, petitioner.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Does an employee of a municipal corporation have the right to invoke the protection of the Fifth Amendment of the United States Constitution and if said individual does invoke the Fifth Amendment does the municipality have the right to discharge him without violating the Due Process clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States as it is applied to the States through the Fourteenth Amendment is involved in this matter.

STATEMENT OF THE CASE

The respondent, Raymond Cox, is a Captain in the Chattanooga Fire Department and has been employed in that department over seventeen (17) years. On April 4, 1972, Detectives Gaston and Rominger of the Chattanooga Police Department were conducting an investigation of a murder which occurred on March 11, 1972. They had received a name of a suspect, Harry Brooks Daniels, who had been arrested in Atlanta, Georgia. Harry Brooks Daniels was arrested in Atlanta, Georgia, and in his possession was found an address book which contained the name of Ray Cox, and two telephone numbers of the Respondent. Said telephone numbers were his home address and also a number at the firehall where he was presently stationed. (Tr. 21). On April 4, 1972, Detectives Rominger

and Gaston went to Respondent's home and requested that he accompany them to the Chattanooga Police Department for questioning. The Respondent lives in East Ridge, Tennessee, and was therefore not required to accompany the officers, as they had no authority to require him to do so. However, he went with them voluntarily, and it is further testified to by all of the officials of the Chattanooga Police Department that he was at all times courteous with them. The Respondent was brought to headquarters for the purpose of showing him some pictures of Harry Brooks Daniels, and determining the relationship between him and Harry Brooks Daniels. (Tr. 23). Upon arrival at Detective office of the Organized Crime Division of the Chattanooga Police Department, ***the Respondent was advised of his constitutional rights and asked to sign a "rights waiver" which he refused.*** The right's form which the Respondent was requested to sign is attached as Exhibit Three (Tr. 103) to the original transcript and is commonly known as the Miranda Form. The Respondent refused to sign said form and requested that he be allowed to talk to an attorney. Commissioner Gene Roberts was summoned to the Detective Office and informed the Respondent that unless he cooperated with the officers that if the City Attorney approved of his action, he would fire the Respondent. The Respondent requested the presence of his attorney and upon his attorney's arriving on the premises, a private discussion was conducted between the Respondent and his present counsel, Jerry H. Summers. Acting upon the advice of counsel, the Respondent continued to refuse to answer the questions and since there were no charges pending against him, he was allowed to leave. On April 5, 1972, Commissioner Roberts sent a letter to the Respondent which stated as follows:

> "This is to advise you that effective at the end of your working day this date your employment with the Chattanooga Fire Department is terminated.

> "You are being dismissed for insubordination, for conduct unbecoming a member of the fire-fighting service and for refusing to cooperate to any extent in an official investigation of the Chattanooga Police Department."

(Exhibit 1, Tr. 101). On April 12, 1972, the Respondent forwarded a letter to Commissioner Gene Roberts (Exhibit 2, Tr. 102) requesting a hearing before the entire City Commission. On June 25, 1972, a hearing was held before the entire City Commission with Commissioner Roberts excusing himself from voting, and a full hearing was held in this matter. Following the hearing of testimony, the Respondent was discharged from the Chattanooga Fire Department by unanimous vote. Subsequent thereto, the Respondent filed a Writ of Certiorari in the Chancery Court of Hamilton County, Tennessee, asking for a trial de novo on the hearing below. The Court sustained Respondent's Motion for Summary Judgment and held that he had been wrongfully discharged in violation of his Fifth Amendment Rights. The ruling of the Trial Court was subsequently upheld by the Court of Appeals of Tennessee, Eastern Division, and the Tennessee Supreme Court.

ARGUMENT

The Respondent respectfully submits that under the case law of this country at the present time, he is entitled to the protection of the Fifth Amendment and Fourteenth Amendment and that the City of Chattanooga has no basis for wrongfully discharging him upon his seeking the protection of the Fifth and Fourteenth Amendments on advice of counsel.

The Fifth Amendment to the United States Constitution was enacted in 1791 and reads as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ***nor shall be compelled in any criminal case to be a witness against himself***, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation." (Emphasis added)

The Fourteenth Amendment to the United States Constitution reads as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court of the United States has been confronted with the legal question involved in this matter on several occasions in the past few years. In order to possibly clarify the contentions of the Respondent in this brief, six (6) leading cases will be cited for the consideration of the Court, those cases are:

Slochower vs. Board of Higher Education of the City of New York, 76 S.Ct. 637, 350 U.S. 551
Garrity vs. State of New Jersey, 87 S.Ct. 616, 385 U.S. 493

Gardner vs. Broderick, 88 S.Ct., 1913, 392 U.S. 273
Uniformed Sanitation Men Association vs. Commissioner of Sanitation of the City of New York, 88 S.Ct., 1917
Kastigar vs. United States, 92 S.Ct. 1653
Zicarelli vs. New Jersey State Commission of Investigation, 92 S.Ct. 1670.

In *Slochower vs. Board of Higher Education of the City of New York*, a professor with twenty-seven years teaching experience was discharged from his position as associate professor of Boston College, an institution maintained by the City of New York, because he invoked the privileges against self-incrimination when he appeared before the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate in New York City. The investigation, conducted on a national scale, related to subversive influence in the American Education System. Professor Slochower, when called to testify, stated that he is not a member of the Communist Party, and indicated complete willingness to answer all questions about his associations or political beliefs since 1941. But he refused to answer questions concerning his membership during 1940 and 1941 on the ground that his answers might tend to incriminate him. The chairman of the Senate Subcommittee accepted Slochower's claim as a valid assertion of an admitted constitutional right. Shortly after testifying before the Internal Security Subcommittee, Slochower was notified that he was suspended from his position at the college and that he was fired from his job. He appealed the ruling to the State's courts, and this matter reached the United States Supreme Court which held that the school board had acted improperly in discharging Professor Slochower for asserting his rights under the Fifth Amendment. He argued, as does the

respondent, *that the mere claim of privilege under the Fifth Amendment does not provide a reasonable basis for the State to terminate his employment.* The Court, in reversing the suspension, said:

> *"At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as one of the most valuable prerogatives of the citizen. Brown vs. Walker*, 161 U.S. 591, 610 S.Ct. 644, 652, 40 L.Ed. 819. We have affirmed our faith in this principle recently in *Quinn v. United States*, 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964. In *Ullmann v. United States*, 340 U.S. 422, 76 S.Ct. 497, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

The 1967 Supreme Court decision of *Garrity vs. State of New Jersey*, involved police officers in certain New Jersey boroughs. The Supreme Court of New Jersey ordered that alleged irregularities in handling cases in the municipal courts of those boroughs be investigated by the Attorney General, invested him with broad powers of inquiry and investigation, and directed him to make a

report to the Court. The matters investigated concerned alleged "*fixing of traffic tickets.*"

Before being questioned, each police officer was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer, he would be subject to removal from office. The police officers answered the questions. No immunity was granted, as there is no immunity statute applicable in these circumstances. Over the defendant's objections, *some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws.* The police officers were convicted and their convictions were sustained over their protests that their statements were coerced, by reason of the fact that, if they refused to answer, they could lose their positions with the police department. The Court in reversing the convictions of the police officers, said:

> "The choice imposed upon petitioners was one between self-incrimination or job forfeiture. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent . . we conclude that policemen, like teachers and lawyers, are not relegated to watered-down version of constitutional rights . . . there are rights of constitutional stature whose exercise a State may not condition by the exaction of a price . . . we now hold the protection of an individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, that it extends to all, whether they are policemen or other members of our body politic."

In *Gardner vs. Broderick*, a policeman brought this action in the Supreme Court of the State of New York seeking reinstatement as a New York patrolman and back pay. He claimed he was unlawfully dismissed because he refused to waive his privilege against self-incrimination. In August 1965, pursuant to a subpoena, appellant appeared before a New York County Grand Jury which was investigating alleged bribery and corruption of police officers in connection with unlawful gambling operations. He was advised that the Grand Jury proposed to examine him concerning the performance of his official duties. He was advised of his privileges against self-incrimination, *but he was asked to sign a waiver of immunity after being told he would be fired if he did not sign. Following his refusal, he was given an administrative hearing and was discharged solely for his refusal.* The question presented in that case was whether a policeman who refused to waive the protection which the privilege gives him under the Fifth Amendment may be dismissed from office because of that refusal. The United States reversed the discharge of the policeman and said:

> "here, petitioner was summoned to testify before a Grand Jury in an investigation of an alleged criminal conduct. He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination . . . he was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege . . . petitioner could not have assumed and certainly he was not required to assume, that he was being asked to do an idle act of no legal effect. In any event the mandate of the great privilege against self-incrimination does not tolerate

the attempt regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment. It is clear that petitioner's testimony was demanded before the Grand Jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to seek to compel the petitioner to waive his immunity."

The companion case to the *Gardner* case is the *Uniformed Sanitation Men Association vs. Commissioner of Sanitation of the City of New York* which was decided in 1968 at the same time of the *Gardner* case. This case involved the discharge of members of the Department of Sanitation of New York City. In 1966, the Commissioner of Investigation of New York City began an investigation of charges that employees of the Department of Sanitation were not charging private cartmen proper fees for use of certain city facilities and were diverting to themselves the proceeds of fees that they did charge. Later that year, each of the petitioners were summoned before the Commissioner. *Each was advised that if he refused to testify with respect to his official conduct or that of any other city employee on the grounds of self-incrimination, his employment and eligibility for any other city employment would terminate. Twelve of the petitioners, asserting the constitutional privilege against self-incrimination refused to testify. After the disciplinary hearing they were discharged by the Commissioner of Sanitation on the explicit ground that they had refused to testify.* Three of the petitioners answered the questions put to them, denying the charges made. They were thereafter suspended by the Commissioner of Sanitation on the basis of information received from the Commissioner of Investigation

concerning irregularities arising out of their employment in the Department of Sanitation. Subsequently, they were summoned before a Grand Jury and asked to sign waivers of immunity, they refused. Administrative hearings were held and they were dismissed from employment on the sole ground that they had refused to sign waivers of immunity. The Supreme Court, in reversing their discharge, held:

> "Petitioners were not discharged merely for the refusal to account for their conduct as employees of the City. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privileges. Three were asked to sign waivers of immunity before the Grand Jury. Twelve were told that their answers to questions put to them by the Commissioner of Investigation could be used against them in subsequent proceedings, and were discharged for refusal to answer the questions on the basis . . . as we stated in *Gardner vs. Broderick, if New York had demanded the petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake.* But here the precise and plain impact of the proceedings against petitioners was to present them with a choice between surrendering their constitutional rights or their jobs.

Petitioners, as public employees, are entitled, like all other persons, to the benefits of the Constitution including the privilege against self-incrimination. *At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which did not involve an attempt to coerce them to relinquish their Constitutional rights.*"

In *Kastigar vs. United States*, 92 S.Ct. 1653, the petitioners were ordered to appear before the Grand Jury and to answer questions under a grant of immunity and on their refusal to answer questions, after asserting their privilege against compulsory self-incrimination, they were adjudged in civil contempt and fined. The Supreme Court, in an opinion by Mr. Justice Powell, held that although a grant of immunity must afford protection commensurate with that afforded by the privilege against compulsory self-incrimination, it need not be broader, and immunity from use and derivative use is co-extensive with the scope of the privilege and is sufficient to compel testimony over the claim of privilege. The Court also held that in any subsequent criminal prosecution of a person who has been granted immunity to testify, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of compelled testimony.

In *Kastigar*, the Court states:

"That the power to compel testimony is not absolute. There are a number of exemptions from the testimony of duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important ad-

vance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence which might be so used. The Court has been zealous to safeguard the values which underlie the privilege.

The *Kastigar* decision was primarily concerned with the question of requiring a witness to testify under a Federal immunity statute. It should be noted that in the principal case no effort was made by the Chattanooga Police Department to discuss the question of immunity, and there is no immunity statute or ordinance under the law in the State of Tennessee or the City of Chattanooga which could be used to grant the Respondent immunity and require him to testify over his Fifth Amendment privilege.

Zicarelli vs. New Jersey State Commission of Investigation, 92 S.Ct. 1670, is a companion case of *Kastigar*, and was also decided in May of 1972. Mr. Justice Powell also rendered the opinion in this case, and the facts are very similar to the *Kastigar* decision. *Zicarelli* also involves an individual who was being questioned regarding criminal activities, and he invoked the Fifth Amendment privilege. Subsequently, the defendant was granted statutory immunity, but refused to testify, basing his decision on the scope of immunity granted. The Court reached the same decision as in *Kastigar* and affirmed the contempt conviction and cited the same reasons as given in *Kastigar*.

The *Tennessee Law Review*, in Volume 39, Number 2, Winter Edition 1972, has a very lengthy and detailed article entitled "The Self-Incrimination Clause and Administrative Law".

The author, in reference to *Slochower vs. Board of Education, supra*, stated:

> "Where the administrative sanction is in the form of a retraction of some benefit or status already conferred, it is a denial of due process of law to impose it solely as a penalty for legitimately invoking a privilege. This is more clear to the case where the benefit or status taken away has no relation to the proceedings in which the claim was asserted."

The author, in commenting on the decision in *Gardner vs. Broderick, supra*, cites Mr. Justice Fortas's opinion:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself . . . the privilege against self-incrimination would not have been a bar to his dismissal.

Going further, the author states:

> "This statement is consistent with other holdings of the court that public employees claiming the privilege may be discharged for 'insubordination,' 'doubtful trust and reliability,' and 'incompetence' providing the sanction is actually based on such grounds rather than the assertion of constitutional right."

The last statement in the *Tennessee Law Review* expresses very clearly the position of the Respondent in the principal case. There is no question that the purpose of questioning the Respondent was to determine the relationship between Raymond Cox and Harry Brooks Daniels, the suspect in the offense being investigated. (Tr. 23). The City's attorney attempts to get around the question of requiring

the Respondent to sign the Miranda rights form by continuously stating that the Respondent was not asked to sign a waiver of immunity from prosecution at any time. The rights provided under the Miranda form are, in fact, asking the Respondent to freely and voluntarily make statements which might possibly be used to incriminate him.

Detective Gaston on page 34 of the transcript made the following statements which are particularly pertinent to the legal issue involved in this matter:

"Q Now, any information which you elicited from this man that you thought was appropriate, you were going to use it in the case, is that not correct?

"A If it was pertinent to the case, of course.

"Q And any information that you may have received from him, if it would in any way implicate him, you would use it in the case, would you not?

"A Of course."

The facts of the principal case are completely in line with all of the decisions cited in the afore-styled paragraph. The Respondent was questioned by Detective Rominger and Gaston of the Chattanooga Police Department, and upon being requested to sign a waiver of his constitutional rights against self-incrimination, requested an attorney. He was informed by Commissioner Roberts that if he did not sign the rights form and cooperate with the detectives in the investigation being conducted by them, he would be discharged from his position as a Captain in the Chattanooga Fire Department. Respondent chose to assert his constitutional right under the Fifth Amendment upon advice of counsel and was subsequently discharged by a letter addressed to him through the United States Mail from Commissioner Roberts the following day.

CONCLUSION

As the petition presents no question which merits this Honorable Court's review on a writ of certiorari, respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JERRY H. SUMMERS,
Attorney at Law,
5th and Lindsey Streets,
Chattanooga, Tennessee 37403,
(615) 265-2385,

Attorney for Respondent.

APPENDIX

[fol. 1]

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

RAYMOND COX *Appellee* *vs.* CITY OF CHATTANOOGA, ET AL *Appellants*	FROM THE CHANCERY COURT FOR HAMILTON COUNTY HON. RAY L. BROCK, JR., CHANCELLOR AFFIRMED

EUGENE N. COLLINS, City Attorney, and RANDALL L. NELSON, Special Counsel, FOR APPELLANTS

JERRY H. SUMMERS OF CHATTANOOGA FOR APPELLEE

OPINION

Parrott, J.

The Board of Commissioners of the City of Chattanooga has appealed from the Chancellor's order reinstating fire captain Raymond Cox whose dismissal for insubordination and conduct unbecoming the fire-fighting service was unanimously affirmed by the Board.

The Chattanooga Police Department was conducting an investigation of a murder which occurred in that city on

March 11, 1972. Harry Brooks Daniels, a suspect of the murder, was arrested in Atlanta, Georgia. On his person was found an address book which contained the name of Raymond Cox, his home telephone number and the two telephone numbers of the precinct station where Captain Cox worked. Two city detectives went to the Cox home and requested he accompany them to the Chattanooga Police Department for questioning. Captain Cox voluntarily rode to the headquarters where the police presented the following form which Captain Cox refused to sign:

[fol. 2] YOUR CONSTITUTIONAL RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering questions at any time. You also have the right to stop answering questions at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am

doing. No promises or threats have been made to me and no pressure, force or coercion of any kind has been used against me.

Signed _____
(refused)

Commissioner of the Fire and Police Departments of the City of Chattanooga, Gene Roberts, came into the headquarters and informed Captain Cox that if he did not cooperate with the officers in this investigation, that if the city attorney approved, he [Commissioner Roberts] would fire him.

Captain Cox requested to see an attorney. Upon his attorney's arrival at the headquarters and after a private discussion between Cox and his attorney, Cox again refused to answer any questions or look at any of the pictures offered by the investigating officers.

On the next day Commissioner Roberts sent a letter to Captain Cox which stated the following:

"This is to advise you that effective at the end of your working day this date your employment with the Chattanooga Fire Department is terminated.

"You are being dismissed for insubordination,
[fol. 3] for conduct unbecoming a member of the fire-fighting service and for refusing to cooperate to any extent in an official investigation of the Chattanooga Police Department."

Captain Cox asked for and was granted a hearing before the full Board of Commissioners of the City of Chattanooga. This hearing was held on June 25, 1972, and by unanimous vote the Board affirmed the dismissal of Captain Cox.

Thereafter Captain Cox, by petition for certiorari, asked for a review of the Board's action by the chancery court. In the chancery hearing, after hearing proof on a motion for summary judgment, the chancellor entered a decree holding Captain Cox had a right to remain silent under the Fifth Amendment and his discharge was a violation of his constitutional rights. The chancellor's decree ordered Captain Cox reinstated with full pay.

From this decree the City has appealed asking for a reversal of the chancellor's order.

There are numerous cases involving municipal and public employees' dismissals under the threat of loss of employment. *Slochower v. Board of Higher Education of the City of New York*, 76 S.Ct. 637, 350 U.S. 551; *Garrity v. State of New Jersey*, 87 S.Ct. 616, 385 U.S. 493; *Gardner v. Broderick*, 88 S.Ct. 1913, 392 U.S. 273; *Uniformed Sanitation Men Assn. v. Commissioner of Sanitation of the City of New York*, 88 S.Ct. 1917; *Kastigar v. United States*, 92 S.Ct. 1653; *Zicarelli v. New Jersey State Commission of Investigation*, 92 S.Ct. 1670.

As we all know, the Fifth Amendment to the United States Constitution provides that no one shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without the due process of law.

[fol. 4] Our United States Supreme Court has held this constitutional right to be one of the most valuable prerogatives of a citizen and there shall not be imputed any sinister meaning by one's exercise of the right. *Brown v. Walker*, 161 U.S. 591, 610 S.Ct. 644; 40 L.Ed. 819.

Also our Supreme Court has held that the free choice to speak out or remain silent is extended to all. In *Garrity v. State of New Jersey, supra*, the Court said:

". . . we conclude that policemen, like teachers and lawyers, are not relegated to watered-down version of constitutional rights . . . there are rights of constitutional stature whose exercise a State may not condition by the exaction of a price . . . we now hold the protection of an individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, that it extends to all, whether they are policemen or other members of our body politic."

The chancellor in his order of reinstatement of Captain Cox cited and heavily relied upon the decision by the United States Supreme Court in *Uniformed Sanitation Men Assn. v. Commissioner of Sanitation of the City of New York* (1968), 88 S.Ct. 1917, where it was said:

"Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege. Three were asked to sign waivers of immunity before the Grand Jury. Twelve were told that their answers to questions put to them by the Commissioner of Investigation could be used against them in subsequent proceedings, and were discharged for refusal to answer the questions on this basis. Garrity v. State of New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d

562 (1967), in which we held that testimony compelled by threat of dismissal from employment could not be used in a criminal prosecution of the witness, had not been decided when these 12 petitioners were put to their hazardous choice. In any event, we need not decide whether these petitioners would have effectively waived this constitutional protection if they had testified following the warning that their testimony could be used against them. They were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips
[fol. 5] which, despite the constitutional prohibition could be used to prosecute them criminally.

"As we stated in Gardner v. Broderick, supra, if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. Gardner v. Broderick, supra; Garrity v. State of New Jersey, supra. Cf. Murphy v. Waterfront Commission, 378 U.S. 52, at 79, 84 S.Ct. 1594, 1607, at 1609, 12 L.Ed.2d 678

(1964). At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

It is apparent from the above, a public employee may be discharged for failing to give an account to his superiors for matters directly relating to the performance of his official duties but not to matters outside the scope of his duties. See *Slochower v. Board of Higher Education of the City of New York*, *supra*; *Gardner v. Broderick*, *supra*.

In this case there is no claim or contention the investigation of the murder was in any way related to or within the scope of duties of Captain Cox. Thus, as distasteful as it may be to some, Captain Cox had the constitutional right under the Fifth Amendment to remain silent. His discharge from his employment, as found by the chancellor, is illegal and in violation of his rights under the Constitution. Accordingly, the decree is affirmed with costs taxed to the appellant.

James W. Parrott, J.

CONCUR:

Robert E. Cooper, P.J.(E.S.)

Clifford E. Sanders, J.